BEFORE THE

SUBCOMMITTEE ON SURFACE TRANSPORTATION AND MERCHANT MARINE

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION

TESTIMONY OF WILLIAM J. AUGELLO, ESQ.

ON BEHALF OF

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

ON THE REVISIONS TO THE CARRIAGE OF GOODS BY SEA ACT

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Of counsel:

Nicholas J. DiMichael
Karyn A. Booth
Donelan, Cleary, Wood & Maser, P.C.
1100 New York Avenue, N.W.
Suite 750
Washington, DC 20005

William J. Augello
George Carl Pezold
Augello, Pezold & Hirschmann, P.C.
120 Main St., Huntington, NY 11743

My name is William J. Augello and I am testifying today on behalf of The National Industrial Transportation League ("League") on the subject of potential reform of the Carriage of Goods By Sea Act. I am a member of the League's Ocean Transportation Committee. The League supports enactment of the revisions to the Carriage of Goods by Sea Act as proposed by the Maritime Law Association.[1]

IDENTITY OF THE LEAGUE

Founded in 1907, The National Industrial Transportation League is a voluntary organization of over 1,000 shippers and groups and associations of shippers that conduct industrial and/or commercial enterprises of all sizes throughout the United States. The League is the oldest and the largest nationwide organization representing shippers that move all kinds of commodities, using all modes of carriage, across interstate, intrastate, and international boundaries. A significant number of League members are users of ocean transportation services. Accordingly, the League maintains a direct and substantial interest in the proposed revisions to the Carriage of Goods By Sea Act.

BACKGROUND OF THE LAWS GOVERNING OCEAN CARRIER LIABILITY

The liability of ship owners for loss of and damage to cargo on the high seas dates back to the days of wooden sailing vessels. In the United States, the statutory scheme that governs cargo loss and damage on the high seas is the Carriage of Goods By Sea Act, which is often referred to as “COGSA.” COGSA was adopted by Congress in 1936 and was modeled after the 1924 International Convention known as the Hague Rules.

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1 The Maritime Law Association is an organization comprised of over 3600 members, including maritime practitioners, judges, law professors, and non-lawyers who hold responsible positions in the maritime field. The stated purpose of the Association is “to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, and to promote uniformity in its enactment and interpretation,” among other related objectives.

With respect to allocating the responsibility for losses to cargo that occur at sea, COGSA was intended to provide for a system of shared risks between the cargo owner and the ship owner. The cornerstone of the 1936 COGSA was the establishment of a liability limit for ocean carriers of $500 per package or, when not in packages, per "customary freight unit." This liability limit has never been adjusted for inflation and thus has remained in effect for more than six decades. Not surprisingly, today a $500 package limitation is grossly inadequate to compensate shippers for cargo that is lost or damaged at sea.

In addition, COGSA exonerates a ship owner from liability for cargo losses if the ship owner proves that the loss was caused by the negligent navigation or mismanagement of the ship. To illustrate how this unconscionable defense has been applied by ocean carriers in the past to avoid liability, a summary of court decisions is annexed as Appendix A. The "nautical fault" defense, as it is often referred to, may have been justified in the early stages of shipping on the high seas when ship owners had no means of communicating with or maintaining control over their captains or crew for long periods of time. However, in modern times, this defense serves no valid purpose given the development of electronic communication systems, improved navigation devices and advances in marine technology. Simply stated, there can be no justification for allowing ocean carrier's to raise negligence as a defense to a claim for damages in ocean cargo movements today.

For years, both cargo interests and ship owners have recognized that COGSA fails to reflect modern shipping practices, such as containerization and through multi-modal shipping. However, these groups have disagreed on the reforms that should be adopted by Congress to improve the United States' statutory scheme for addressing cargo loss and damage on the high seas.

In 1978, the United Nations held a Convention on the Carriage of Goods by Sea to modernize ocean carriage liability laws. At this Convention, cargo owners worldwide supported the repeal of the "nautical fault" defense and an increase in ship owners' liability. As a result of that Convention, the Hamburg Rules were drafted. One of the principal changes made by the Hamburg Rules was to repeal the nautical fault defense.

In addition, the Hamburg Rules more than doubled the ship owners' limitation of liability under COGSA. The Hamburg Rules did not come into force as an international treaty until November 1, 1992, after being ratified by 20 nations. However, because ship owners and insurers opposed adoption of the Hamburg Rules, no significant trading nation adopted these Rules. However, in the past, the League has supported adoption of the Hamburg Rules by the United States.

Carrier interests, on the other hand, have generally encouraged the United States to adopt the 1979 Hague-Visby Rules ("Hague-Visby"). Under Hague-Visby, the liability of an ocean carrier would be raised to 666.67 Special Drawing Rights ("SDR's") per package, or 2 SDR's per kilogram. An SDR is a fictitious currency based upon the weighted average of the currencies of the United States, Britain, Japan, Germany and France. The value of this unit of account fluctuates daily. As of April 8, 1998, one SDR was valued at $1.337490. To illustrate the degree of fluctuation, on April 18, 1995, one SDR was valued at $1.59342.

Approximately 70% of the world's ocean trade moves under the Hague-Visby Amendments, whereas only 2% operate under the Hamburg Rules. The United States has not adopted either due to the opposing interests' inability to reach a consensus. As a result, U.S. cargo owners have been limited to the recovery of only $500 per package

under the application of COGSA while their foreign competitors are able to recover up to 667 SDR's per package on cargo losses, approximately $892 per package on April 8, 1998. Furthermore, our foreign competitors also have the option of claiming compensation at 2 SDR's per kilogram, or $1.22 per pound, whichever is greater.

THE MLA COMPROMISE

In 1992, an ad hoc committee of interested parties was formed by the MLA in an effort to seek a commercial compromise on reforming COGSA. I was personally involved in the negotiation of the compromise on behalf of cargo interests. Progress was made when ship owning interests agreed to the repeal of the nautical fault defense, which was of critical interest to shippers. Cargo owners then agreed to accept the Hague-Visby liability limits in lieu of the higher Hamburg Rules limit of 835 SDR's per package, or 2.5 SDR's per kilogram. Other legal and procedural issues were negotiated to the satisfaction of most interests.

It was not until 1995, when the U.S. Supreme Court upheld the validity of foreign arbitration clauses in foreign bills of ladings in the decision of Seguros y Reaseguros S.A. v. M/V Sky Reefer, et al., 115 S.Ct. 2322, 1995 AMC 1817 (1995) ("Sky Reefer"), that U.S. cargo insurers joined cargo owners to support the MLA compromise. Their support was conditioned, however, on the legislation's overturn of Sky Reefer.

On May 3, 1996, by an overwhelming vote of 278-33, the MLA's membership voted to approve the MLA Committee's compromise. This compromise was approved later that year by the League's Ocean Transportation Committee and in early 1997 by the League's Board of Directors.

Under the MLA’s proposal, cargo owning interests will benefit in several material respects:

1. Ocean carriers will no longer be able to avoid liability for cargo losses caused by the carrier's negligent navigation or mismanagement of the ship. However, the burden of proving such negligence has been shifted to the claimant raising that allegation. Maritime attorneys representing cargo interests do not believe that this burden will be insurmountable.

2. The liability limitation of $500 per package will be almost doubled to 677.66 SDR’s per package, which equated to $892 on April 8, 1998.

3. An alternative basis for recovery has been added for claimants. When a package weighs 937 pounds or more, the carrier's liability limit is 2 SDR's per kilogram, or $1.22 per pound, based on the value of one SDR on April 8, 1998.

4. The term "package" is defined as the units of packaging used for the cargo as described on the bill of lading. This should end attempts by carriers and insurers to treat an entire steamship container or pallet load as the "package", and thus limit their liability to only $500 for the entire shipment.

5. The new package limitation will apply to all individual packages, even when they are palletized or unitized, if the total number of packages is shown on the bill of lading.

6. The former practice of limiting the $500 limit to the "customary freight unit", such as when the rate is based on an entire vehicle, locomotive, or other large product, has been eliminated. Thus, claimants on unpackaged units will be able to base their claims on 2 SDR's per kilogram.

7. Claimants will be able to recover the full value of their cargo when they can prove that the loss was caused by the carrier's "unreasonable deviation," such as a deviation for the purpose of loading or unloading cargo or passengers.

8. Claimants on cargo moving to or from U.S. ports have the right to select a forum in the United States rather than be bound by a foreign forum clause in a bill of lading.

9. “On deck” cargo will now be covered by COGSA. Formally, cargo owners had the burden of proving the carrier’s negligence and lack of due care in loading cargo on deck.

10. Carriers may not be able to recover from cargo-owners under a "general average" claim if the carrier's negligent navigation or mismanagement of the ship caused the loss.

11. Cargo will now be covered for the entire period it is in the carrier's possession and control, rather than only "from tackle to tackle". This will allow coverage from "door-to-door" on through intermodal movements if specified on the bill of lading.

12. The liability limitations will not apply if it is proved that the loss or damage resulted from an act or omission of the carrier, done with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

13. Electronic communications and bills of lading are provided for.

14. Carriers are prohibited from discriminating between competing shippers.

* * *

In conclusion, the League urges the Congress to enact these important revisions to COGSA. In the League's view, they represent a balanced compromise that will lead to global uniformity in the treatment of ocean carrier cargo liability. These revisions should result in lower cargo insurance premiums for shippers and more reasonable claim settlements, thus avoiding lengthy, expensive litigation, particularly in foreign jurisdictions. These reforms would also facilitate the containerization revolution and through intermodal transactions, developments that were not contemplated in 1936 when COGSA was enacted.

In supporting the MLA compromise, it should be noted that the League's position in support of the Hamburg Rules has not changed. However, to achieve what shippers feel are necessary changes to COGSA, the League takes the position that the MLA proposal achieves a number of objectives that were originally provided for under the Hamburg regime. In addition, the compromise achieves a balanced and equitable approach for shippers, ship owners and others concerned over rules affecting international cargo liability.

The League further notes that it is aware of other interest groups that may have concerns with the proposed COGSA revisions. In fact, the League has participated recently in discussions with certain groups concerning this issue and is willing to continue the dialogue with such interested parties.

The League would like to thank the Committee for the opportunity to present this testimony, and would be pleased to provide any additional information desired or answer any questions the Committee may have.

APPENDIX A

ANALYSIS OF COURT DECISIONS INVOLVING "NEGLIGENT NAVIGATION & MISMANAGEMENT OF SHIP" DEFENSES (1967-1983)

CASES IN WHICH THE CARRIER WAS EXONERATED FROM LIABILITY BECAUSE IT PROVED IT WAS NEGLIGENT:

1. *Patton-Tulley, Lim. Procs*., 1983 A.M.C. 1288 (E.D. La. 1983).

   [The master's decision to attempt to navigate a tugboat pushing LASH barges through the Louisiana side of the bridge in light of the prevailing channel conditions, local practice and against the advice of the helper tug, was held to be an error in navigation.]

2. *Insurance Co. of N.A. v. G.A. Georgilas*, 1983 A.M.C. 1916 (S.D.N.Y. 1983).

   [Pilot caused the vessel's port bow to strike the wall on entering a lock with sufficient force to cause a crack to develop in the ballast tank plating, thus allowing the ballast water to leak into number one cargo hold.] [Amount of loss $90,268.]

3. *Amoco Transport v. Mason Lykes*, 550 F. Supp. 1264, 1983 A.M.C. 1087 (S.D. Tex. 1982)

   [Negligence of watch officer resulted in the collision between two vessels. Although no cargo was damaged, the shipper was required pay freight even through the voyage was abandoned. The court held that "barring the carrier from its guaranteed freight because of navigational negligence of its employees would be in conflict with the desired goal of COGSA."]

4. *General Electric v. Lady Sophie*, 1979 A.M.C. 2554 (S.D.N.Y. 1979).

   [The cause of the damage was the negligent anchor watch of the second mate which resulted in the vessel being exposed to synchronous rolling, causing the turbine to be torn from its lashings on deck.] [Amount of loss $502,992.]

5. *American Smelting & Refining Co. v. S/S Irish Spruce*, 548 F.2d 56 (2d Cir. 1977).

   [While the failure to have the up-to-date List of Radiobeacons was an unseaworthy condition, said unseaworthiness was not to the proximate cause of the grounding. The proximate cause of the grounding was the failure of the vessel's officers to make full use of the out-of-date List of Radiobeacons on board the vessel.]

6. *Yawata Iron & Steel v. Anthony Shipping*, 396 F. Supp. 619, 1975 A.M.C. 1602 (S.D.N.Y. 1975).

   [Master's decision to head into a storm even though number one hatch cover was damaged and twisted open causing flooding in that hold, resulted in the vessel sinking.] [Amount of loss $1,458,014.]

7. *Matter of Grace Line, Inc. v. S.S.S. Santa Leonor*, 1974 A.M.C. 1253 (S.D.N.Y. 1973), aff'd 517 F.2d 409 (2d Cir. 1975).

   [Cause of the accident was result of the pilot ordering an excessively wide port turn, which caused the ship to strike a reef on the starboard side.]

8. *California and Hawaiian Sugar Co. v. Columbia S/S Co.*, 510 F.2d 542 (5th Cir. 1975).

   [Stranding of the vessel was due to the failure of the master to make proper use of the information available to him and not due to a failure to supply the vessel with appropriate charts or the malfunction of any of the vessel's navigational equipment.]

9. *Complaint of Compania Naviera Epsilon, S.A.*, 1974 A.M.C. 2608 (2d Cir. 1973).

   [The master committed the following errors: 1) the master's decision to use the One and Half Degree Channel when the navigation guides aboard the vessel recommended safer routes; 2) the master's failure to plot a course of change, which resulted in a chain of errors which caused the vessel to strand; 3) the master's failure to take into account currents affecting the vessel's course and 4) the master's decision not to use the vessel's radar.]

10. *Director General of India Supply Mission v. S.S. Mary* (Ex. Riverhead, Ex. Theokeetor), 459 F.2d 1370, 1972 A.M.C. 1694 (2d Cir. 1972), aff'g 1972 A.M.C. 1238 (S.D.N.Y. 1971).

    [While the court found the vessel was unseaworthy because the only chart of the area on board the vessel was 20 years old and inaccurate, it also found that the shipper was unable to establish that this unseaworthiness was the cause of stranding. . . The vessel's legal draft was 27' - 09", but at the time of the stranding, the vessel was drawing 28' - 7.5". Even if the vessel was at its legal draft, the vessel would still have run aground due to the Master's negligent navigation, since the vessel ran aground in 24' of water.] [Amount loss due to shortage $6,234; salvage contribution $146,072; and general average contribution $21,760.]

11. *Director General of India Supply Mission v. S.S. Janet Quinn*, 335 F.Supp. 1329,

1972 A.M.C. 1227 (S.D.N.Y. 1971).

[Decision of the vessel's Captain and Pilot to heave up anchor and proceed through the Suez Canal instead of waiting for another vessel to pass resulted in collision between the two vessels.]

12. *Wilbur-Ellis Co. v. M/V Capacayannis "S"*, 451 F.2d 973 (9th Cir. 1971), aff'g 306 F.Supp. 866, 1969 A.M.C. 2484 (D.C. Ore. 1969).

[Master's decision to proceed across the Columbia River Bar without a pilot in a storm was the proximate cause of the grounding.]

13. *Insurance Co. of North America v. S/S Flying Trader*, 306 F.Supp. 221 (S.D.N.Y. 1969).

[Master maneuvered the vessel into the trough of a heavy sea in order to pick up the pilot. The Master, in direct violation of the "Sailing Directions" negligently maneuvered the vessel to an unsafe location resulting in the heavy rolling of the vessel and loss of the cargo] [Amount of loss $13,000.]

14. *American Metal Co. v. M/S Bellvelle*, 284 F.Supp. 1002 (S.D.N.Y. 1968).

[Cause of the stranding was held to be an error in navigation by the Master of the vessel and not the 10-15 mile deviation to drop off the pilot which was a common custom.]

15. *American Ind. Oil Co. v. M/S Alkaid*, 289 F.Supp. 329 (S.D.N.Y. 1967) 1968 A.M.C. 748.

[Vessel struck a submerged object while proceeding up the East River. Since the striking of the object was either an error in navigation or a "peril of the sea," the carrier was not liable.]